1979

FMA Financial Corporation v. Hansen Dairy, Inc. et al : Brief of Appellant

Utah Supreme Court

Gayle Dean Hunt; Attorney for Respondents;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FMA FINANCIAL CORPORATION, Plaintiff-Appellant, vs. HANSEN DAIRY, INC., et al., Defendants-Respondents, vs. JAMES M. LEVIE and LAVOY CHRISTIANSEN, Third-Party Defendants-Respondents.	:	CASE NO. 16528

APPELLANT'S BRIEF

Appeal from the Judgment in the Sixth Judicial District Court of Sanpete County, State of Utah

Honorable Don V. Tibbs, Judge

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James L. Levie
Respondent pro se

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Honorable Don V. Tibbs, Judge

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PLAINTIFF-APPELLANT'S BRIEF

STATEMENT OF THE CASE

Lessor, FMA Financial Corporation ("FMA"), claims damages for breach of a written lease agreement for a silo. Lessee, Hansen Dairy ("Hansen"), filed a third-party complaint against James M. Levie ("Levie"), the vendor-supplier of the silo.

DISPOSITION IN THE LOWER COURT

The Court below granted judgment (a) for Hansens against FMA and (b) for FMA against Levie. The lower Court found

"complete failure of consideration" for the lease between FMA and Hansens. (R. 129, 130)

RELIEF SOUGHT ON APPEAL

FMA, Appellant, wants the judgment for Hansens against FMA reversed.

STATEMENT OF FACTS

The pleadings name five persons or entities as parties: (1) FMA Financial Corporation ("FMA"), lessor, plaintiff, and appellant. (2) Hansen Dairy, Inc., a Utah corporation, Stephen L. Hansen, Larell Hansen, Mariel O. Hansen, and Val Gene Hansen, d/b/a Hansen Dairy, a partnership, are one party, designated "Hansens." Hansens are lessee, defendant, and respondent. FMA and Hansens stipulated at trial that Hansen Dairy, Inc. and the partners of Hansen Dairy are liable for any judgment against them in favor of FMA. (T-4, 5) (3) Federated Dairy Farms was not served. (4) Hansens did not serve summons or third-party complaint on Lavoy Christiansen. (5) James M. Levie ("Levie") is the vendor-supplier, third-party defendant, and respondent. He was served March 1, 1978 (R. 87), and his default entered by the Court on May 31, 1978. (R. 89)

Hansens owned and operated a dairy farm near Centerfield, Utah. In 1971 or 1972, Hansens contacted Levie, a dealer, about leasing grain silos. Levie arranged and consummated

the leasing through I.T.T. Leasing Company. (T-69, 70) Levie continued to visit the Hansens as prospective customers through 1973. In 1973, the Hansens contacted Levie about getting them another silo. (T-74)

On June 25, 1973, the Hansens executed a "Sales Agreement" (Plaintiff's Exhibit 13) with Levie (J & L Feeding) to lease equipment described as:

One (1) used 36-foot by 60-foot silo and unloader Conoco roof unsealed

Two (2) 18-foot Kirby feed wagons

One (1) blower

Levie was to install the silo except for the electrical labor. The total price was $36,000.00 plus sales tax of $1,620.00. The "Sales Agreement" provided the Hansens would lease the equipment for $835.00 per month for five (5) years. Hansens and Levie did not complete the "Sales Agreement" because the Hansens wanted a lower monthly payment and a lease term of more than five years. (T-71)

Levie shopped for a lower monthly payment and longer lease period. He talked with I.T.T. Leasing Company; their maximum lease term was five years. (T-80) In July, 1973, Levie took the proposed silo transaction to FMA and spoke with Mr. Scott Mayne, an FMA employee. (T-161) Mr. Mayne explained to Levie the documentation FMA requires to evaluate the transaction. Levie told Mr. Mayne the silo was not yet on the site, indicating it would take a week or so to deliver and complete it. (T-165)

On August 3, 1973, Levie returned to FMA's offices in Salt Lake City with documents he received earlier from Mr. Mayne. The documents are dated August 1, 1973; the Hansens signed them as corporate officers rather than as partners. (See Plaintiff's Exhibits 3 and 4.) Levie told Mayne the silo was under construction in Centerfield, Utah, and would be completed in a few days. (T-178) Levie wanted payment; Mr. Mayne explained to him that payment would not be made until the Hansens verified satisfactory delivery and installation by signing the "Acceptance Notice," which notice was attached to the lease form. (T-163)

The Hansens had signed the Lease Agreement (Plaintiff's Exhibit 3) as corporate officers. There was no corporation; therefore, the corporate execution was unacceptable to FMA. (R. 156-188) Levie, therefore, obtained a second set of lease papers for the Hansens to execute as partners of Hansen Dairy.

This explains the two sets of lease documents, one set dated August 1, 1973 and signed by the Hansens as officers of a corporation (Defendant's Exhibit 3), and the other set dated August 6, 1973 and signed only by Stephen L. Hansen (Plaintiff's Exhibit 1). FMA received a certificate of general partnership from the Hansens (Plaintiff's Exhibit 2).

Levie needed money to buy the silo and equipment. He did not have the money. Unless he could get money from FMA, he would have to borrow interim financing from a bank.

(T-48, 49, 50, 89, 151) Because of the critical need for money, Levie flew to Gunnison, Utah on or about August 6, 1973 and met with Stephen L. Hansen. He told Stephen L. Hansen that if the Hansens would sign the "Acceptance Notice" (Plaintiff's Exhibit 10), he would take the "Acceptance Notice" to FMA and get his money, expediting the entire transaction. Levie further told Hansens this procedure would save him time, allow him to obtain and erect the equipment, and save the Hansens time and money. (T-88, 89) Stephen L. Hansen then signed the Lease Agreement (Plaintiff's Exhibit 1) and the Acceptance Notice (Plaintiff's Exhibit 10).

Levie returned to Salt Lake City with the second set of signed documents about August 7, 1973. (T-97, 98, 126, 127, 137, 138) Mr. Mayne was in Colorado. Levie and his wife met with Shanni Staker of FMA and gave her the signed documents. Shanni Staker gave Levie the $36,000.00 check (Plaintiff's Exhibit 11). (T-163, 164, 198, 199) Mr. Mayne returned from Colorado to find that Levie had returned the signed documents and had been given the check.

Levie contradicts his own testimony and the testimony of his wife on this point. Both Mr. and Mrs. Levie testified that on the occasion of receiving the check, they met with Mr. Mayne who delivered the check to them. (T-137, 138, 154, 155) On rebuttal, Levie testified he received the check from Shanni Staker because Mr. Mayne was not in the office. (T-198, 199)

During the first week of August, 1973, Hansens executed a milk assignment which provided that Federated Dairy Farms pay FMA $748.64 per month for milk sold by Hansens to Federated Dairy Farms. Federated Dairy Farms acknowledged the Assignment in writing on August 8, 1973 to become effective August 15, 1973. (Plaintiff's Exhibit 5.) The monthly payment included a use tax of $32.24; the balance, $716.40, is the actual lease payment. (R. T-202) Federated Dairy Farms made twenty-seven payments to FMA pursuant to the Assignment before Hansens directed payment stop. (R. T-202)

Levie was solely responsible for construction of the silo. (T-34, 102, 111, 121, 136) Hansens and Levie orally agreed the silo would be up by corn harvest time, 1973. (T-37, 128) FMA was unaware of the deadline. (T-180) Levie testified he was unsure whether he told Mr. Mayne of the deadline. Levie testified he gave Mr. Mayne a copy of the "Sales Agreement" between Levie and the Hansens. (Plaintiff's Exhibit 13, T-143, 144.) The "Sales Agreement" provides the equipment is to be "substantially completed by September 1, 1973." The "Sales Agreement" was between Levie and the Hansens. Mr. Mayne testified he had never seen the "Sales Agreement" before the trial. (T-173)

In late August or early September, 1973, Levie realized he would not be able to install the equipment by corn harvest time because of difficulty in getting the silo torn down from its original location in Nevada. (T-129, 140) In late September or early October, 1973, when the silo was about two-thirds to three-fourths completed, the Hansens became "fed up and

wanted out" of the transaction. (T-138, 140, 141) Hansens told Levie to cease construction. (T-91, 92, 93, 94) The installation would have been complete in two weeks. (T-140)

Levie ceased construction. Hansens kept the two Kirby wagons valued at $2,500.00 each. (T-67, 130) Levie sold equipment parts for $5,000.00, which FMA received. Some silo parts are at Hansen Dairy; others are in the possession of Levie.

FMA was unaware the silo was incomplete. The Hansens represented to FMA the silo was complete ("Acceptance Notice," Exhibit 10.)

Mr. Mayne testified he told Levie he could not be paid until Hansens signed the "Acceptance Notice." (T-163, 165, 166) During early August, 1973, Levie told Mayne the equipment was still in Nevada. (T-126, 135, 136) Mrs. Levie corroborated this. (T-152) Mr. Mayne says Levie told him: the equipment was dismantled, a crew was installing it, and construction would be complete in a few days. (T-165, 178)

When the Hansens signed the "Acceptance Notice," they knew the silo was incomplete. (T-81)

POINT I

WHEN THE HANSENS EXECUTED THE "ACCEPTANCE NOTICE" (PLAINTIFF'S EXHIBIT 10), THEY KNEW THE SILO WAS INCOMPLETE, YET REPRESENTED IN WRITING IT WAS COMPLETE. FMA RELIED ON THE MISREPRESENTATION AND PAID LEVIE $36,000.00. THIS COURT SHOULD ESTOP HANSENS FROM CLAIMING THE INCOMPLETE SILO IS FAILURE OF CONSIDERATION.

Estoppel in pais is an equity doctrine. It prevents one from deluding or inducing another into a position where the other will unjustly suffer loss. This doctrine has four elements: (1) conduct, by act or omission; (2) by which one party knowingly leads another party; (3) reasonably acting thereon; (4) to take some course of action which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation. J. P. Koch, Inc., v. J. C. Penney Company, Inc., 534 P.2d 903, (Utah 1975).

Hansens knew the silo erection was incomplete and signed the "Acceptance Notice" (Plaintiff's Exhibit 10). The "Acceptance Notice" states: "THIS MUST BE EXECUTED AND RETURNED TO FMA LEASING COMPANY BEFORE PAYMENT CAN BE MADE TO SUPPLIER." It is addressed to FMA and further states: "All of the items referred to above were received by us on the below date and were and are in good order and condition and acceptable to us as delivered or installed."

Levie needed money; he wanted to get it from FMA to avoid interim financing costs. (T-48, 49, 50, 89, 151) Levie told the Hansens if they would sign the "Acceptance Notice," it would save them time and money. (T-88, 89) Levie and Hansens agreed Levie would make two lease payments to FMA for the Hansens for signing the "Acceptance Notice." (T-88) Levie and the Hansens colluded to induce FMA to pay

Levie $36,000.00. FMA relied upon the "Acceptance Notice" representation that the Hansens received the silo and equipment from Levie on August 7, 1973 and "were and are in good order and condition and acceptable to us as delivered or installed."

Hansens acted affirmatively; they knowingly misrepresented facts with the intent FMA rely on them. Hansens lead FMA into issuing the $36,000.00 check to Levie; FMA reasonably relied on the "Acceptance Notice." FMA was unaware the silo was unacceptable to the Hansens. Levie delivered the wagons and the silo; the silo installation was incomplete. The Hansens lead FMA to pay Levie $36,000.00 which will result in FMA's damage if the Court permits the Hansens to repudiate or deny their representation.

Mr. Levie told Scott Mayne the silo was incomplete around the last of July and first part of August, 1973. (T-126, 152) Levie also told Mayne a crew was on the site, and they would complete the silo within a few days. The first time Levie told this to Mayne was during the latter part of July, 1973 when Levie got the original documentation. (T-165) Approximately August 3, 1973, Levie told Mayne the "silo was under construction in Centerfield, and that it would be completed in a few days." (Emphasis added.) (T-178) A few days later, Mr. Levie returned with the signed "Acceptance Notice" Exhibit 10). It was reasonable for FMA to believe the silo was delivered or installed and acceptable

to the Hansens as represented. When Levie delivered the signed "Acceptance Notice" to FMA, Mr. Mayne was not present; Levie presented it to Shanni Staker who delivered the check to Mr. Levie. (T-97, 98, 126, 127, 137, 138, 163, 164, 198, 199)

The commercial community relies on written representations. Businessmen have insufficient time to personally confirm deliveries and installations made by third parties. It is commercially unreasonable to require leasing companies to confirm each delivery and installation; the law must allow them to rely upon lessee's written representations that delivery and installation by the vendor-supplier is satisfactory.

The Hansen Dairy silo is 200 miles from FMA's office. FMA reasonably relied upon the representations of the vendor, Levie, that the silo and other equipment would be completely delivered and installed within a few days of August 3, 1973, and upon Hansens subsequent representations that the leased items were "received by us on August 7, 1973 and were and are in good order and condition and acceptable to us as delivered or installed."

Shanni Staker was unaware the silo installation was incomplete. Hansens acknowledged in writing it was satisfactory; she delivered Levie the $36,000.00 FMA check.

Hansens made 27 monthly lease payments to FMA. (R. 124) The Hansens then stopped making lease payments saying the installation or delivery of the equipment by Levie was not

satisfactory, contrary to Hansens' earlier written representations to FMA. The Court should estop Hansens from repudiating the effect of their written representation to FMA causing FMA to pay $36,000.00 to Levie; otherwise, FMA will be damaged by Hansens' misrepresentations.

POINT II

THE LOWER COURT ERRED IN FAILING TO ENFORCE THE LEASE AND IN FINDING "FAILURE OF CONSIDERATION" BECAUSE: (A) INSTALLATION WAS NOT A PROVISION OF THE LEASE; AND (B) HANSENS PREVENTED LEVIE FROM COMPLETING THE SILO.

In paragraph 17 of the Findings of Fact, the lower Court found "a failure of consideration at inception." The finding is unclear. In General Ins. Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976), the Court stated: "There is a distinction between lack of consideration and failure of consideration. Where consideration is lacking, there can be no contract. Where consideration fails, there was a contract when the agreement was made, but because of some supervening cause, the promised performance fails." The lower Court probably means failure of a condition or breach of contract; because, the silo was incomplete. [See 1 Williston on Contracts (3d. Ed.) §19A, p. 490.]

A. The "corn harvest time" deadline was not a part of the lease between FMA and the Hansens.

You must find the contract terms; then you can determine

if there was a breach or failure of a condition. When an agreement is written, integrated, clear, definite, and unambiguous, you find the terms within the four corners of the instrument. Parol evidence is inadmissible to vary or to add terms set forth in the writing. E. A. Strout Western Realty Agency, Inc. v. Broderick, 552 P.2d 144, 145 (Utah 1974).

On August 6, 1973, FMA and the Hansens executed the Lease Agreement (Plaintiff's Exhibit 1). Hansens claim a condition or promise of this agreement was Levie would complete the silo by corn harvest time, 1973. The Lease Agreement contains no such provision. Paragraph 3, "Rent and Term" is the only provision dealing with the time and the term of the Lease. It states: "The term of the Lease commences upon the date on which the Lessor issues its purchase order for equipment to supplier . . ." Completing the silo by corn harvest time is not in the Lease.

The Lease Agreement is integrated, clear, definite, and unambiguous. Hansens are attempting to add to or modify the Agreement. This violates the parol evidence rule.

Levie and Hansens negotiated for a sale prior to contacting FMA. (T-37) FMA was unaware of the time element. Levie testified he gave Scott Mayne a copy of the proposed sale contract between him and the Hansens. (T-143, 144) Mayne saw the document the day of trial. (T-175) The time provision of the Levie-Hansens sale contract is not a term of the FMA-Hansens Lease.

What is meant by corn harvest time? Stephen L. Hansen testified corn harvest time can run from mid-September to mid-October. (T-93) In 1973, Hansens began harvesting about October 10th. (T-48) By the end of September, 1973, Levie's installment of the silo was two-thirds to three-fourths complete; he would have completed it within about two weeks. (T-138, 140, 141)

Hansens ordered Levie to cease construction. (T-129, 138, 140) Levie may well have completed the silo by corn harvest time.

The silo has a long life; Hansens could have used it for many years. (T-93) A two-week delay is brief compared to the silo's useful life. If the delay prevented Hansens using the silo for 1973's harvest year, maximum damage was $4,000.00. (Defendants' Exhibits 9 and 12.) If damaged, Hansens' remedy is against Levie.

Paragraphs 4, 5, and 6 of the Lease Agreement deal with the condition of the equipment, claims against the supplier, and relation of the parties. Paragraph 4 acknowledges that Hansens have selected the equipment and the supplier, and that the equipment is leased "as is." In paragraph 5, Hansens agree to make any claim for improper installation or operation solely against the supplier. In paragraph 6, Hansens acknowledge the supplier, Levie, is not FMA's agent.

The specific language of paragraphs 4, 5, and 6 provides:

4. No warranties by lessor. Lessee has selected both (a) equipment and (b) below named supplier from whom lessor is to purchase it. Lessor makes no warranties express or implied as to any matter whatsoever, including the condition of equipment, its merchantability or its fitness for any particular purpose, and, as to lessor, lessee leases equipment "as is."

5. Claims against supplier. If equipment is not properly installed, does not operate as represented or warranted by supplier, or is unsatisfactory for any reason, lessee shall make any claim on account thereof solely against supplier, and shall, nevertheless, pay lessor all rent payable under this lease. Lessor will include, as a condition of its purchase order, that supplier agree that all warranties, agreements and representations, if any, which may be made by supplier to lessee or lessor may be enforced by lessee in its own name. Lessor hereby agrees to assign to lessee, and does hereby assign, solely for the purpose of making and prosecuting any said claim, all of the rights which lessor has against supplier for breach of warranty or other representation respecting equipment.

6. Supplier not an agent. Lessee understands and agrees that neither supplier, nor any salesman or other agent of supplier, is an agent of lessor. No salesman or agent of supplier is authorized to waive or alter any term or condition of this lease, and no representation as to equipment or any other matter by supplier shall in any way affect lessee's duty to pay the rent, and perform its other obligations as set forth in this Lease.

The Lease Agreement provides the remedy for this unfortunate problem. The Hansens leased the equipment from FMA "as is." Hansens selected Levie and the equipment. They agreed to claim against Levie for any installation problem and to make payment to FMA.

B. Hansens conduct in preventing Levie's completion of the silo precludes Hansens from asserting failure of consideration.

Before corn harvest time, 1973, Hansens ordered Levie to stop construction. (T-129, 138, 140) Hansens began harvesting corn about October 10, 1973. (T-58) Levie would have completed the silo in about two weeks. (T-138, 140, 141) If Hansens had allowed Levie to complete the silo, the silo would have been less than a week late. It is well established that a party preventing completion of an agreement cannot assert failure of consideration. Del Riccio v. Photochart, 124 C.A. 2d 301, 261 P.2d 841 (1954).

CONCLUSIONS

The Court should estop Hansens from deriving any benefit against FMA from Levie's failure to complete the silo on time. Hansens acknowledged in writing to FMA the silo was delivered, installed and satisfactory. Hansens knew the silo was incomplete; FMA did not know it was incomplete. FMA relied upon Hansens representation and paid Levie $36,000.00. If the Court sustains the Hansens misrepresentation, FMA loses the 27 monthly lease payments made by Hansens and may be unable to recover any of the $36,000.00 paid by FMA to Levie.

Levie's failure to complete the silo by corn harvest time is not failure of consideration as between FMA and

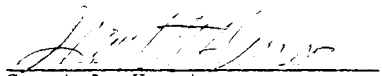
Hansens. It was not a term of the FMA-Hansen Lease. The Hansens prevented Levie from completing the silo.

The lower Court judgment in favor of Hansens and against FMA should be reversed and the lease enforced.

DATED this ____ day of December, 1979.

Respectfully Submitted,

Milo S. Marsden, Jr.



Grant A. Hurst

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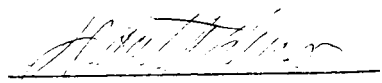
CERTIFICATE OF DELIVERY

I caused a copy of the foregoing BRIEF to be delivered to Gayle Dean Hunt, 2121 South State, Salt Lake City, Utah, this 2nd day of January, 1980.



MAILING CERTIFICATE

Mailed a copy of the foregoing BRIEF to James L. Levie, 2950 North 320 East, Provo, Utah 84601, this 3rd day of January, 1980, postage prepaid.